SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

October Term, 1974.

No. 74-1063

CARL R. CARTER, ACADEMY FILMS CORPORATION, DONALD A. DAVIS, DONALD A. DAVIS PRODUCTIONS, INC., DONALD KLEIN, and HARLAN DAGEL, Petitioners,

V.

UNITED STATES OF AMERICA, Respondent

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

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Petitioners,

V.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

The petitioners, Carl R. Carter, Academy Films Corporation, Donald A. Davis, Donald A. Davis Productions, Inc., Donald Klein, and Harlan Dagel, respectfully pray that writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Sixth Circuit filed November 21, 1974.

OPINIONS BELOW.

The opinion of the Court of Appeals, not yet reported, is printed as Appendix A. The opinion of the District Court for the Western District of Tennessee was not reported, but is printed as Appendix B.

JURISDICTION.

The opinion of the Sixth Circuit was filed on November 21, 1974. A timely Petition for Rehearing was filed on or about December 4, 1974. On December 27, 1974, an order was entered denying the Petition for Rehearing, and a copy of said order appears as Appendix C hereto. An Order Extending Time to File Petition for Writ of Certiorari was granted by Justice Steward extending time of filing to and including February 25, 1975.

This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Conspiracy Statute, Title 18 U.S. Code, Section 371, as applied to a violation of 18 U.S.C. 1462 or 1465 is overbroad, vague, unworkable, contrary to the free speech and due process of law guaranties of the First and Fifth Amendments to the Constitution of the United States in that an indictment charging a nationwide conspiracy is not constitutionally permissable because contemporary community standards of the nation as a whole cannot be defined. There is no national standard and there is no available community standard that could be applied in a trial charging nationwide conspiracy.

2. Whether the provisions of Title 18 U.S. Code, Section 371, as applied to a violation of 18 U.S.C. 1462 or 1465, are overbroad, vague, unworkable, contrary to the free speech and due process guaranties of the First and Fifth Amendments to the United States Constitution in that as applied to a charge of nationwide conspiracy to distribute allegedly obscene films throughout the United States there could be no appropriate charge to a jury to define appeal to prurient interest or patent offensiveness by applying local community standards of the average person.

3. Whether the Conspiracy Statute, Title 18, U.S. Code, Section 371, as applied to a violation of 18 U S.C. 1462 or 1465 is overbroad because an indictment charging a nationwide conspiracy to distribute obscene motion pictures throughout the United States is unconstitutionally violative of the First and Fifth Amendments to the United States Constitution in that the indictment requires the motion picture film to be obscene throughout the United States, that is "in each and every local community."

4. The community is construed by the Government to be the Western District of Tennessee, the area from which the jurors are chosen. Are the provisions of Title 18, U. S. Code, Sections 1462 and 1465 overbroad and in violation of due process as applied to the free press and speech or due process guarantee of the First and Fifth Amendment to the United States Constitution in that if local community standard is to be applied, it must be the standard of the community to which the material is transmitted for exhibition or distribution?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

First Amendment; due process clause Fifth Amendment; 18 U.S.C. 371, 18 U.S.C. 1462 and 18 U.S.C. 1465 (printed in Appendix D).

STATEMENT OF THE CASE

The District Court picked this case from among approximately ten to dismiss the indictment for the purpose of appeal. This case and one other demonstrates even more that the indictment on conspiracy is invalid and overbroad.

Jurisdiction of the District Court was invoked by an indictment charging violation of the Title 18 Sections 371, 1462 and 1465.

The indictment against petitioners was returned on November 16, 1972. It charged violations of Title 18 United States Code, SS1462 and 1465, and a conspiracy count under S371.

The indictment charged that petitioners Carl R. Carter, Academy Films Corporation, Donald A. Davis, and Donald A. Davis Productions joined together in a business enterprise for the purpose of distributing obscene films **throughout the United States.**

The purpose was to profit financially from the sale, distribution, and public exhibition of obscene motion picture films. It further alleges that between August of 1971 through May of 1972, Academy Film Corporation shipped to various places **throughout the United States** a number of motion picture films.

The conspiracy charge, therefore, is a conspiracy to exhibit obscene films **throughout the United States.** There are eighty-six substantive counts in the indictment of alleged shipment of obscene films. Fifty-two of the counts are shipments from Memphis, Tennessee to Chicago, Illinois, where it appears the films were exhibited in a public theater. The place of storage and distribution is alleged to be Memphis, Tennessee. The question before the District Court and before the Court of Appeals was what **community standards** would be applicable for judging obscenity. Clearly, Chicago is in the same class as Las Vegas and New York for material that would be acceptable to be shown. Twenty-three additional counts were return of the films from Chicago to Memphis. One count is for a shipment to Indianapolis, Indiana.

Five counts are shipments from Memphis, Tennessee to Portland, Oregon. Oregon at the time had no prohibition on what films might be seen by adults. As commented on by the Court in **Miller v. California,** 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419, Oregon law allowed any material to be shown which was not forced upon adults and to which minors were not admitted. The policy of Oregon, therefore, was that it was not against any law, and therefore not in violation of any federal statute if the community standards of Oregon were used.

Two counts were shipments from Oregon back to Tennessee, and three counts were shipments from Tennessee to Kentucky.

On November 16, 1973, one year after the indictment, all of the pre-trial motions were heard on all pending obscenity cases. During the period from November 19, 1972 through June of 1973, approximately ten obscenity cases were filed in the Western District of Tennessee, and all of these pending motions were heard in one consolidated argument.

The Court on December 12, 1973 granted this defendant's Motion to Dismiss the Indictment as a test case. The decision was based on two grounds; first that the decision of the Supreme Court in the **Miller** case could not be applied retroactively. This ground has clearly been overruled in **Hamling v. U.S.,** ..... **U.S.** ....., 94 S. Ct. 2887.

The Court's second ground for dismissal was as follows:

"Second, that since the Supreme Court held in those decisions that there is no national standard and that since only a national standard could be applied under these Federal interstate transportation statutes, **there is no available standard that could be applied** in a trial charging violation of these statutes; or **alternatively, that if a local standard could be applied, it would not be the standard of this locality and therefore a jury here could not apply the applicable standard.**" (emphasis supplied).

The Court of Appeals reversed on the basis of **Hamling v. U.S.,** supra, and **ignored** the questions raised of what contemporary community standards were applicable to the substantive counts and the overbroadness of the conspiracy statute when applied to a nationwide obscenity conspiracy charge.

In **The United States of America v. Paul David Gerber, et al,** No. 73-45, one of the companion cases, the indictment alleges a conspiracy whose "ultimate object" was "to profit financially the defendant and others by the public exhibition of said motion picture films to paying patrons of theaters **throughout the United States".** (emphasis supplied)

The Appropriate portions of the indictments in U.S. v. Carter et al and U.S. v. Gerber et al are printed in Appendix E.

The producer and maker of the film was indicted in the Gerber case as well as Sherpix, Inc., the distributor of the film, and Art Theatre Guild, Inc., owner of a number of theaters which displayed the film. Sherpix was the alleged nationwide distributor. The indictment alleges that Sherpix, Art Theater Guild, and others collaborated concerning "the national distribution of 'School Girl' to exhibitors" (Count One, Paragraph 20).

It was further alleged that for a period approximately spanning the duration of the conspiracy, some of the defendants shipped prints of the motion picture **"throughout the United States to its theaters where it was exhibited to the public".** Not only the nationwide distributor but all of the sub-distributors and some of their officers and employees were indicted. Part of the conspiracy was the arrangement between the distributor, Sherpix, Inc., to engage sub-distributors to distribute the motion picture film in **generally specified geographic areas** throughout the United States, and the indicted distributors were as follows: Ellis Gordon, Boston, Massachusetts;

Marvin Friedlander, Marvin Films, Inc., New York, New York; Gordon Craddock and Craddock Films, Inc., Atlanta, Georgia; Martin Zide and Allied Film Exchange, Inc., Detroit, Michigan; Jerome Sandy and American International Pictures Exchange of Washington, D. C., Inc., Washington, D. C.; Abbott Morton Swartz and Independent Film Distributors, Inc., Minneapolis, Minnesota; Emanuel Youngerman and M. Y. Film Company, Inc., Philadelphia, Pennsylvania; John O. Glaus and John O. Glaus Agency, Pittsburgh, Pennsylvania; and Lou Wolfe, and Harry Brandt Booking Office, Inc., New York, New York.

The Court is well aware of the usual distribution of a motion picture film. The owner or producer either acts as a distributor throughout the nation, or has a nationwide distributor. The nationwide dstributor has various sub-distributors in various geographic regions throughout the country. The sub-distributors have a certain territorial area to distribute a film and make known to the motion picture theaters the availability of the particular motion picture film and all others from that distributor. None of the sub-distributors have any control over what **"community"** the motion picture may be shown in any of the other geographic areas.

The distribution of a motion picture film has none of the elements of a usual conspiracy.

There is no common design for the accomplishment of a common purpose, that is, some unlawful act, or a lawful act by unlawful means. Each showing of the motion picture is independent and the sub-distributor may book or arrange for the show-

ing of the motion picture in any **community** within his territory. There is no connection between the sub-distributors throughout the country and there could be no knowledge or scienter that the motion picture was being shown to violate the contemporary community standards of any particular community.

There is further no possible conspiracy, or the conspiracy is overbroad, to charge a conspiracy throughout the United States, unless the government must prove that the film is obscene in each and every jurisdiction throughout the United States.

The conspiracies involving **U.S. v. Carter, et al,** and **U.S. v. Gerber, et al,** allege as acts of a conspiracy not only that there was an agreement to distribute throughout the United States, but that in pursuance to the conspiracy the film was shipped by either the distributor or the sub-distributor throughout the United States. In the companion case of **U.S. v. Gerber, et al**, shipment among others went between the following places: San Francisco, California to New York, New York; Fort Lee, New Jersey to Memphis, Tennessee; United States to France; United States to Holland; Atlanta, Georgia to Alexandria, Virginia; San Jose, California to Milford, Connecticut; Scottsdale, Arizona to Buffalo, New York; Buffalo, New York to Boston, Massachusetts; Philadelphia, Pennsylvania to Boston, Massachusetts; Pittsburgh, Pennsylvania to Buffalo, New York; Pittsburgh, Pennsylvania to Toledo, Ohio; Washington, D. C. to Norfolk, Virginia; New York, New York to Oak Park, Michigan. The indictment also alleges that it was distributed to various other areas in the sub-distributor's geographic area.

The most important allegation in these cases is that the conspiracy exists to distribute the motion picture film **throughout the United States,** and that all of these shipments were pursuant to the conspiracy to distribute an obscene motion picture film for exhibition throughout the United States.

In the companion case of **U.S. v. Gerber** there was as in the case of **U.S. v. Carter,** an application filed by the United States Attorney to authorize the seizure of the motion picture films. The seizure took place in Memphis and the District Court found probable cause and ordered the film seized.

Based upon the probable cause determination by one Judge in the Western District of Tennessee, the United States forwarded this judgment and obtained search warrants in New York (where the master negative was located), New Jersey, Minnesota and California and seized the master negative and nine (9) to ten (10) prints throughout the country.

That ended the nationwide distribution and exhibition of the film.

The finding of the Judge in one District would not make the film a violation of the contemporary community standards of another district. Likewise, the exhibition of the film or ts transportation from New York to Memphis would not make the film obscene throughout the country and sustain the indictment of all sub-distributors as part of a conspiracy to distribute an obscene film throughout the United States.

What community standard is to be used. This issue of multiple seizures upon this preliminary probable cause determination and stopping the nationwide distribution of multiple search warrants is before the Court for consideration by a Petition for Certiorari of **Art Theatre Guild, Inc., and Sherpix, Inc., petitioners, v. Larry E. Parrish, Thomas F. Turley, Jr., et al,** No. 74-749.

The **overbroadness** of the conspiracy charge in the **Carter** indictment, as well as companion cases, in which this case is a test case is demonstrated by both the indictment in this case and the Petition for Certiorari in the civil case of **Art Theatre Guild, Inc., et al, v. Larry E. Parrish, et al.** No. 74-749.

REASONS FOR GRANTING THE WRIT

1. THE SIXTH CIRCUIT COURT OF APPEALS REVERSED AND IMPROPERLY DECIDED THE ESSENTIAL ISSUE IN THE DISTRICT COURT'S DISMISSAL BELOW WHICH IS OF CRITICAL NATIONAL IMPORTANCE.

The Sixth Circuit in its opinion reported in Appendix A overlooked the essential basis on which the District Court dismissed the indictment, to wit: that local community standards cannot be applied to a nationwide conspiracy or, alternatively, that if there is a local standard on transportation statutes that it is not the local standard of the Western District of Tennessee and the indictments in this District should be dismissed.

The holding of the Sixth Circuit in effect **abolishes** the local standard rule in a prosecution under the conspiracy statute, 18 U.S.C. 371, and **abolishes** the local standard under the transportation statutes, 18 U.S.C. 1462 and 1465.

The local standard is abolished under the conspiracy and transportation statutes because in the **Carter** case, the material was for exhibition in Oregon where there was no obscenity statute, or in Chicago, and the District Court determined the standard would not be the Western District of Tennessee.

In the related **Gerber** case, sub-distributors were indicted who merely distributed the material in New York State or in California or in Michigan and yet are to be judged by the triers of fact in the Western District of Tennessee.

The Sixth Circuit relied upon **Hamling v. United States,** U. S. , 94 S. Ct. 2887. However, **Hamling** did not hold that a Memphis jury can apply standards of the Western District of Tennessee to convict regional sub-distributors or to convict on a transportation statute when the material is for exhibition in Chicago, Illinois. The application of the local communty standards rule and the entire line of cases on which the local community standards rule is based shows that the obscenity of the material is tested by a jury of and in the place where the material is distributed and exhibited.

In addition to the petitioner's case and the related case of **United States v. Gerber,** which will be affected by the outcome of this case, there are probably pending many cases throughout the United

States. It is of national importance therefore that a correct rule of law be applied for these prosecutions. The Sixth Circuit, besides relying upon **Hamling**, cited their decision in **Smith v. United States**, No. 73-2062, 73-2141, and 73-2142 (Sixth Circuit, November 13, 1974). These cases were convictions which were on appeal. The Court had charged national standards of the country as a whole. This, of course, is similar to **Hamling** and the defendants who had insisted upon national standards could not object to the affirmance of their conviction using national standards as a base. In this case, however, these defendants **have not** gone to trial and would be entitled to an instruction **most favorable** to their position. If the Court holds that the transportation statutes, 1462 and 1465, must be construed as to require the local community to be the place where the material is distributed or exhibited, then the defendants are entiled to have the nationwide conspiracy dismissed and if the entire indictment was dismissed, that any future action would be required on the basis of distribution into the particular community involved.

The opinion of the Sixth Circuit did not deal with whether the conspiracy statute was overbroad or if the community standard was of some local community not the Western District of Tennessee. Certainly those issues were before them and are a matter of natonal importance and should be accepted by this Court.

2. THE CONSPIRACY STATUTE, 18 U.S.C. 371, IS OVERBROAD AND VAGUE AS APPLIED TO A VIOLATION OF 18 U.S.C. 1462 or 1465.

The United States is not entitled to draft a conspiracy indictment which is an overbroad and unconstitutional application of 18 U.S.C. 371 charging conspiracies to violate Title 18, U.S.C. 1462 or 1465. This is an overbroad and vague application contrary to the guarantees of the First Amendment and the due process of the Fifth Amendment. The indictment on the conspiracy charge is a conspiracy to exhibit obscene motion picture "throughout the United States". It is a charge of a nationwide conspiracy to distribute motion picture films. The conspiracy statute cannot be applied to a nationwide conspiracy to distribute obscene material. This is not to say that there cannot be a conspiracy to distribute obscene material when it is alleged that the object of the conspiracy is to distribute it into the area where it was transmitted and the community standards for both a conspiracy and a substantive offense would be from that area or community.

The charging part of the conspiracy count in **Hamling v. U.S.** U.S. 94 S. Ct. 2887, did not charge that the object of the conspiracy was to profit the defendants by the sale of the material throughout the United States, but was limited in area.

The charging part of the conspiracy in this case and in the related cases such as **United States v. Gerber** charges as the unlawful object of the conspiracy the public exhibition of the films at "theaters throughout the United States" and to profit financially by a nationwide distribution of the film.

The concept of contemporary community standards for conspiracy charging a nationwide conspiracy for distribution are unlimited.

The Court has stated that what may be obscene in one community might be "found tolerable in Las Vegas, or New York City." (**Miller v. California**, 93 S. Ct. at 2619). Contemporary community standards for a nationwide conspiracy cannot be determined. If the material was tolerated in any community, there could be no nationwide conspiracy since the substantive crime of distributing obscene material would not be a crime in Las Vegas or New York City.

According to the World Almanac, 1973, published by Newspaper Enterprises Association, page 132, Americans live in 20,768 recognized places across the country of which 18,666 are incorporated — 6,790 cities; 6,116 towns; 4,531 villages; and 1,229 boroughs.

There is no estimate of the areas from which a jury may be drawn except by compilation of each of judicial districts within a state. In each Federal jurisdiction, the number of districts, plus the number of divisions within a district could be classed as the "community". The geographic area of the community would be of innumerable sizes.

The conspiracy statute or its attempted application to First Amendment rights by alleging a nationwide conspiracy is overbroad in that there can be no ascertainable local contemporary community standard. The use of community standard by the jury is to determine whether the material appeals to the prurient interest or is patently offensive by applying the community standard of the average person. If there is an allegation of a nationwide conspiracy,

then it must be to the nation which is the community or else it must be obscene in each and every community.

The District Court not only held that there would be no available standard that could be used in a trial, but in the alternative, found that if a local standard could be applied, it would not be the standard of this locality and therefore a jury in the Western District of Tennessee could not apply "the applicable standard".

The rule is well established by this Court in such cases as **Gooding v. Wilson,** 405 U.S. 513, 92 S. Ct. 1103; **Dombrowski v. Pfister,** 380 U.S. 479, 85 S. Ct. 1116; **Coates v. City of Cincinnati,** 402 U.S. 611, 91 S. Ct. 1686, and many others, that where statutes regulate or proscribe speech and when no readily apparent construction suggests itself as a vehicle for rehabilitating the statutes in a single prosecution, the Court allows an attack on overly broad statutes with no requirement that the person making the attack demonstrate his own conduct could not be regulated by a statute drawn with a requisite narrow specificity.

In **Keyishian v. Board of Regents,** 385 U.S. 589, 87 S. Ct. 675, the Court recognized and emphasized that precision of regulation must be the touchstone in an area so closely touching our most precious freedoms and standards of permissive statutory vagueness are strict in the area of free expression. "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." (Id.) 87 S. Ct. at

684. This doctrine finds expression again and again such as in **United States v. Thirty-Seven (37) Photographs,** 402 U.S. 363, 91 S. Ct. 1409.

Petitioners suggest that the conspiracy statute cannot be applied to any nationwide conspiracy to violate Sections 1462 and 1465, but must be or should be limited to a conspiracy to a particular locality or area or areas wherein community standards may be found. Otherwise, there is no permissible charge possible to the jury under the conspiracy statute to enable the defendants to have fair notice and a fair trial.

A statute is overbroad if it sweeps within its reach that which is permitted as well as that which may be proscribed. **Keyishian v. Board of Regents.** 385 U.S. 589 at 609 (1967); **Gooding v. Wilson,** 405 U.S. 518 at 522 (1972).

The essence of the government's contention in a nationwide conspiracy case is that the **standards of any local community are completely immaterial in a Federal Prosecution.** (The government's position on community standards is stated in a Reply Brief of one of the government's attorneys in the pending case of **Art Theater Guild, Inc. and Sherpix, Inc. v. Parrish, et al.,** No. 74-749.)

United States v. Orito, 413 U.S. 139, 93 S. Ct. 2674 (1973) held that Congress had the power to regulate the flow of obscene material in interstate commerce. However, that power must be exercised in conformity with the First Amendment. **Orito,** id at 2678 n. 6, (citing inter alia **Brooks v. United States,** 267 U.S. 432, 434, 437 (1925) and **Weber v. Freed,** 239 U.S.

525 (1915) stated one basic premise for the exercise of that power, namely the protection of the citizens of states where material is disseminated and, with reference to exhibition of prizefight pictures to prevent **"the demoralizing effect of such exhibition in the state of destination."** (emphasis supplied).

What the Sixth Circuit held is completely contrary to the First Amendment meaning of community standards for ever fifty years, and completely at odds with the specific hold of part III of **Miller v. California, 413** U.S. 15 at 430-434 (1973) and the entire line of cases on which it is based, as well as **Hamling.**

Under the First Amendment a community standards rule involves what the community accepts and tolerates. It involves change and it involves **diversity** of attitudes between different States and local areas as to **what the particular community finds acceptable concerning depictions of sexual matters in terms of the needs, moral attitudes, beliefs, tastes, general welfare of the particular community where the material is exhibited or distributed. United States v. Kennerly,** 209 F. Supp. 119 at 121 (S.D. N.Y. 1913); **Miller,** supra, 413 U. S. at 33; **Jacobellis v. Ohio,** 378 U.S. 184 at 200-201 (1964) dissenting opinion of former Chief Justice Warren quoted with **emphatic** approval on the community standards rule in **both Miller** and **Hamling; Cain v. Kentucky,** 397 U.S. 319, 319-320 (1970) (dissenting opinion of Chief Justice Burger cited with approval in **Miller,** id. at 433); **Roth v. United States,** 354 U.S. 476 at 505-506 (1957) concurring and dissenting opinion of Mr. Justice Harlan cited with approval in **Miller,**

id. at 433. This is the essential guideline in the application of the local community standards rule.

Miller said, 94 S. Ct. at 2620:

> **"People in different states vary in their taste and attitudes,** and this **diversity** is **not to be strangled by the absolutism of imposed uniformity."**

Both **Miller,** and **Hamling,** cited with emphatic approval and quoted from the dissenting opinion of Mr. Justice Warren in **Jacobellis,** supra, 378 U.S. at 200-201. The former Chief Justice said:

> **"But the communities throughout the nation are in fact diverse . . . and the court, in cases such as this one (i.e., obscenity cases) is confronted with the task of reconciling conflicting rights of the diverse communities within our society and of individuals."** (parentheses and emphasis supplied).

In **Cain v Kentucky,** supra, 397 U.S. 319-320,

Chief Justice Burger said:

> "In my view we should not inflexibly deny to each of the States the power to adopt and enforce **its own standards as to obscenity** and pornographic materials; States ought to be free to deal with varying conditions and problems in this area. I am unwilling to say that Kentucky is without power to bar public showing of this film; therefore, I would affirm the judgment from which the appeal is taken."

Miller, 93 S. Ct. at 2620 **cites with approval** the concurring and dissenting opinion of Mr. Justice Harlan in **Roth,** supra, 354 U.S. at 505-506.

Mr. Justice Harlan said with reference to the federal obscenity statute: "Different States will have **different** attitudes" (id. at 505); there is no overwhelming danger **"so long as other States are free to experiment"** (id. at 505); however, with federal control there is danger that **"the prerogatives of the States to differ on their ideas of morality will be destroyed"** (id. at 506); and their ability to experiment stunted (id. at 506) (emphasis supplied).

The District Court correctly dismissed the indictment on the grounds here urged. Where, as here, the indictment and proposed trial is **not** based upon what happened in Memphis, Tennessee, but rather whether the material is allegedly obscene throughout the country, the statutes, as applied, are overbroad.

What petitioners urge is completely consistent with **United States v. 12 200 Ft. Reels,** 413 U.S. 123, at 129, 130 (1973) where this Court held that the standards for testing the constitutionality of state legislation are applicable to the federal legislation.

The obscenity of the material must be tested by a jury in the place where the material is disseminated and **in accord with the standards of that community.**

Hamling, 94 S. Ct. at 2901 stated that a "precise" geographical area is not required. That statement in **Hamling** is now being twisted to mean that local community standards are **completely irrelevant, a superfluous relic.**

What the United States proposed and what is going to happen is that this and the related cases, as well as future cases, are going to be tried on the

basis of no standard at all insofar as the community standards test is concerned for a nationwide conspiracy. Where there is no reasonably clear guideline for citizens, the triers of fact, (or law enforcement officials) a statute on its face, or here, as applied, is unduly vague. **Smith v. Goguen,** 415 U.S. 566 at 573 (1974). In this case the statutes, as applied, are both unduly vague and overbroad.

Jenkins v. Georgia, U.S. , 94 S. Ct. 2750 at 2753 held it is "constitutionally permissible to permit juries to rely on the understanding of the community from which they came".

The Government has no burden of proving what the local standards are. **Paris Adult Theatre I v. Slaton,** 413 U.S. 49 at 56 (1973). So a prima facie case goes to a Memphis jury who are supposed to know and apply the standards of 50 states and many communities. **That is no standard at all.** Even if there were just one other state there would be no standard. A Memphis jury cannot be presumed to know the standards of Oregon.

We will not bore this Court with the total mishmash of what would happen if defendant tried to prove the standards of fifty different states.

The essence of the community standard rule is that different communities apply different and variable standards depending upon the tastes and tolerance of the particular communities. Another aspect is that even in a particular community, the standard turns on what that particular community accepted

in terms of explicitness of display of sexual material. **This is unlike any other crime.** In no other crime is community acceptance the measure of the crime.

It is consistent with the opinions of this Court and with the First Amendment and Federal regulation of obscene material to limit the application of the conspiracy statute to a determination of whether material is obscene in the area where it is to be exhibited. A nationwide conspiracy would be an overbroad application of the statute as opposed to a conspiracy to distribute within a specific geographical area. While a state may not be required to define a specific geographical area, the state in and of itself is the area. Virtually everybody from judges, lawyers, law enforcement officials, to the average citizen has interpreted the decisions of this Court as turning back control to the local areas which at the very largest would be the states. There is no confusion in applying that same rule to a Federal conspiracy case. Everybody understands it. It makes sense that if the material is acceptable in a particular community where it is exhibited, then it is acceptable for that area in terms of interstate shipment.

An indictment for a conspiracy for a nationwide distribution of obscene material is overbroad and the District Court was correct in dismssing the indictment in that there was no available standard that could be applied in the trial court and if a local standard could be applied, it would not be the standard of the Western District of Tennessee.

3. THE INTERSTATE TRANSPORTATION STATUTES, 18 U.S.C. 1462 and 1465, ARE UNCONSTITUTIONALLY OVERBROAD AND MUST BE CONSTRUED SO AS TO REQUIRE COMMUNITY STANDARDS OF THE PLACE INTO WHICH THE MATERIAL IS TRANSPORTED FOR PURPOSES OF DISPLAY OR EXHIBITION.

The interstate transportation of obscene material should be construed to determine that the local community standards are the place of the intended exhibition or display. It was stated in **Jenkins v. Georgia**, supra, that even though questions of appeal to the prurient interest or patent offensiveness are essentially questions of fact, the jury does not have an unbridled discretion. The question of appeal to the prurient interest or patent offensiveness are to be decided by the average person applying contemporary community standards. The triers of fact in Memphis, Tennessee, could not determine the appeal to prurient interest or the patent offensivness to the average person applying community standards when the material was destined for exhibition purposes in Chicago, Illinois.

The transportation statutes must be **authoritatively construed** so as to avoid an overbroadness and limit the application to the community standards to which the material was transmitted for exhibition or display and not the standards of the triers of fact in the particular district in which the trial might be held. The venue of a conspiracy statute is in any district where any of the acts in furtherance of the conspiracy were committed by the conspirators.

The venue of the trial in an interstate transportation case is the district from, through, or into which the material is transmitted since it is a continuing offense. 18 U.S.C. 3237 (b). While this may be the rule for venue, the substantive rule of law for applying contemporary community standards should be the district into which the material is transmitted for exhibition or display. This Court has held in **Hamling,** supra, that any constitutional principle enunciated in **Miller** which would serve to beneft defendants must be applied in their case. **Miller** recognized the difficulty in formulating uniform national ed the difficulty in formulating uniform national standards. It therefore requred that the standards were to be local contemporary community standards.

In **Hamling,** the Court went on to state that evidence of standards in other localities would be permissible. This might be permissible from the standpoint of the defense. In **Hamling**, the jurors were drawn from the Southern District of California and the standards would be of that community. As to other communities, the Court said:

> "But this is not to say that a District Court would not be at liberty to admit evidence of standards existing in some place outside of this particular District, if it felt such evidence would assist the jury in the resolution of the issues which they were to decide." 94 S. Ct. at 2902

The transportation counts clearly require that the standards should not be of the Western District of Tennessee, but of some other locality and the Dis-

trict Court was therefore correct in dismissing the indictment. As to the transmission of the material, the Court said:

> "The fact that distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they **transmit the materials does not** render a federal statute unconstitutional because of the failure of application of uniform national standards of obscenity. Those same distributors may be subjected to such varying degrees of criminal liability in prosecutions by the States for violations of state obscenity statutes; we see no constitutional impediment to a similar rule for federal prosecutions." 94 S. Ct. 2902

The Court was therefore recognizing the rule that the standard was that of the District into which the material was transmitted.

This rule finds a basis in the power of Congress to regulate the flow of obscene material in interstate commerce. See **United States v. Orito,** 413 U. S. 139 at 144 n. 6. The cases cited in Footnote 6 on the interstate transportation clearly support the authoritative construction of the transportation statutes to require the community standard to be that of the community into which the material is transported for exhibition or display. The right of Congress to regulate interstate commerce is the right of "forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty, or the spread of any evil or harm to the people of **other states** from the state of origin." **Brooks v. United States,** 69 L. Ed. at 701. The **Brooks** case cites a number of other

cases in which it was held that Congress could pass laws preventing diseased animals injuring the stock of other states; the transmission of lottery tickets to other states, thus demoralizing the other states through the spread of a gambling habit; and the importation of pictorial representations of prize fights designed for public exhibition because of the demoralizing effect of such exhibitions **in the state of destination.** On the other hand, transportation of articles manufactured by child labor was not prohibited.

The rationale behind the transportation statutes is that what may be legal in one state became a federal transportation offense if it is illegal in the state of destination; for example, liquor or lottery.

The Court should therefore **authoritatively construe** and **limit** the congressional prohibition of interstate transportation of obscene materials to be those prohibited by the community standards of the community in which the products are shipped for purposes of display or exhibition.

CONCLUSION

The Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served upon opposing counsel the within and foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit by mailing three (3) copies thereof, postage prepaid, to:

Robert H. Bork
Solicitor General of the United States
Department of Justice
Washington, D. C. 20530

Thomas H. Turley
United States Attorney
Federal Building
Memphis, Tennessee 38103

This day of February, 1975.

FRIERSON M. GRAVES, JR.
Esquire
Solicitor General of the United States
Department of Justice
Washington, D. C. 20530

Thomas H. Turley
United States Attorney
Federal Building
Memphis, Tennessee 38103

FRIERSON M. GRAVES, JR.
Esquire

This day of February, 1975.

APPENDIX A.

No. 74-1150

UNITED STATES COURT OF APPEALS

For The Sixth Circuit

United States or America,

Plaintiff-Appellant,

v.

Carl R. Carter, Academy Films Corp., Donald A. Davis, Donald A. Davis Productions, Inc., Donald Klein and Harlan Dagel,

Defendants Appellees.

Appeal from the United States District Court for the Western District of Tennessee, Western Division

Decided and Filed November 21, 1974.

Before: PECK and LIVELY, Circuit Judges, and CECIL, Senior Circuit Judge.

PER CURIAM. The government perfected this appeal from an order entered by the district court dismissing an indictment. Defendants-appellees were charged, on November 16, 1972, with the transportation of obscene movies in interstate commerce by means of a common carrier in violations of 18 U.S.C. S1462 and with transportation of obscene movies in interstate commerce for the purpose of distribution in violation of 18 U.S.C. S1465 and with conspiracy to violate the aforesaid contained eigthy-seven substantative counts and one conspiracy count.

The district court dismissed the indictment on the motion of defendants-appellees on the grounds that "the decisions of the Supreme Court of June, 1973*, may not be 'applied retroactively to . . . conduct which . . . occurred prior to those decisions," and because the statutes under which the indictment was drawn required the application of the rejected "national standard" to the obscenity question.

The Supreme Court dismissed similar arguments in Hamling v. United States, 42 U.S.L.W. 5035 (U.S. June 24, 1974), and this Court finds the positions advocated by defendants-appellees meritless. See Smith v. United States, Nos. 73-2062, 73-2141 and 73-2142 (6th Cir, filed November 13, 1974).

The judgment of the district court is reversed and the cause is remanded for further proceedings consistent herewith.

*Miller v. California, 413 U.S. 15 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973); Kaplan v. California, 413 U.S. 115 (1973); Heller v. New York, 413 U.S. 483 (1973).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA
v.
CARL R. CARTER
ACADEMY FILMS CORPORATION
DONALD A. DAVIS
DONALD A. DAVIS PRODUCTIONS, INC.
DONALD KLEIN and
HARLAN DAGEL

Criminal Court 72-207

MEMORANDUM DECISION

In this indictment, the defendants are charged with the transportation of obscene movies in interstate commerce by means of a common carrier in violation of 18 U.S.C. S 1462 and with transportation of obscene movies in interstate commerce for the purpose of distribution in violation of 18 U.S.C. S 1465 and with conspiracy to violate the aforesaid statutes in violation of 18 U.S.C. S 371. There are in the indictment eighty-seven substantve counts and one conspiracy count which alleges ninety-six overt acts. The transportation of movies alleged is transportation from Memphis to Chicago, Memphis to Portland, Oregon, and Memphis to Indianapolis, and Chicago to Memphis, and Clarksville, Tennessee to Oakgrove, Kentucky. There are over thirty movies involved.

This Court has heretofore heard and overruled certain pre-trial motions but has taken under advisement the motion to dismiss upon the grounds herein dealt with.

Defendants have moved to dismiss the indictment on these grounds. First, that the decisions of the Supreme Court of June, 1973 may not be 'applied retroactively' to the conduct which is the basis of this indictment because such conduct occurred prior to those decisions. Second, that since the Supreme Court held in those decisions that there is no national standard and that since only a national standard could be applied under these federal interstate transportation statutes, there is **no available standard that could be applied in a trial charging violation of these statutes**; or alternatively, that if a local standard could be applied, it would not be the standard of this locality and that therefore a jury here could not apply the applicable standard.

This Court has considerable doubt as to the validity of these contentions, and since there are approximately ten other cases in this jurisdiction in which the same issues are raised, we are of the opinion that it would be well to have these issues resolved prior to the trial of these cases. Accordingly, this Court has decided to grant defendants' motion to dismiss in this case alone on both of these grounds so that the Government may appeal and obtain a resolution of these issues.

The Clerk will enter a judgment dismissing this indictment.

ENTER: This 12th day of December, 1973.

/s/ Bailey Brown
CHIEF JUDGE

APPENDIX C.

No. 74-1150

UNITED STATES COURT OF APPEALS
FOR THE SIXTH COURT

UNITED STATES OF AMERICA

Plaintiff-Appellant

v.

CARL R. CARTER, ACADEMY FILMS CORP., DONALD A. DAVIS, DONALD A, DAVIS PRODUCTIONS, INC., DONALD KLEIN AND HARLAN DAGEL

Defendants Appellees

ORDER

Before: PECK and LIVELY, Circuit Judges, and CECIL Senior Circuit Judge.

Defendants-appellees having filed a petition for rehearing with this Court, and this Court having considered said petition and being duly advised in the premises,

IT IS ORDERED that the petition for rehearing be, and it is hereby denied.

ENTERED BY ORDER OF THE COURT
John P. Hehman
Clerk

APPENDIX D.

United States Constitution and Statutes Involved.

FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise

thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Due Process Clause Of The Fifth Amendment

No person shall be * * * deprived of life, liberty, or property, without due process of law.

UNITED STATES CODE:
Title 18, Section 371

S 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

TITLE 18, SECTION 1462

S 1462. Importation or transportation of obscene matters.

Whoever brings into the United States, or any place subject to the jurisdiction thereof, or knowingly uses any express company or other common car

rier, for carriage in interstate or foreign commerce-

(a) any obscene, lewd, lascivious, or filthy book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character; or

(b) any obscene, lewd, lascivious, or filthy phonograph recording, electrical transcription, or other article or thing capable of producing sound; or

(c) any drug, medicine, article, or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use; or any written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indrectly, where, how, or of whom, or by what means any of such mentioned articles, matters, or things may be obtained or made; or

Whoever knowingly takes from such express company or other common carrier any matter or thing the carriage of which is herein made unlawful—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

TITLE 18, SECTION 1465

S 1465. Transportation of obscene matters for sale or distribution.

Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

The transportation as aforesaid of two or more copies of any publication or two or more of any article of the character described above, or a combined total of five such publications and articles, shall create a presumption that such publications or articles are intended for sale or distribution, but such presumption shall be rebuttable.

When any person is convicted of a violation of this Act, the court in its judgment of conviction may, in addition to the penalty prescribed, order the confiscation and disposal of such items described herein which were found in the possession or under the immediate control of such person at the time of his arrest.

APPENDIX E.

Part of Count Eighty-Eight of Indictment in
United States v. Carl R. Carter, et al.,
Cr. No. 72-207
In The
UNITED STATES DISTRICT COURT,
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION.
UNITED STATES OF AMERICA
v.
CARL R. CARTER, et al.
Cr. No. 72 207
18 USC, S371
18 USC, S1462
18 USC, S1465
18 USC, S2

INDICTMENT

COUNT EIGHTY-EIGHT

From on or about June 1, 1971 up to and including on or about May 25, 1972, in the Western District of Tennessee, Western Division, and in divers other places,

CARL R. CARTER
ACADEMY FILMS CORPORATION
DONALD A. DAVIS
DONALD A. DAVIS PRODUCTIONS, Inc.
DIANA FILMS, Ltd.
DONALD KLEIN, and
HARLAN DAGEL,

hereinafter referred to as defendants, and William Mallozzi, Nelson Shroat, Donald Bower, Arnold Cohen, and Jim Irwin, named herein as co-conspira-

tors but not as defendants, willfully and knowingly did combine, conspire, confederate and agree with each other, and with divers other persons whose names are to the Grand Jury unknown, to violate various laws of the United States by planning and agreeing to use common carriers to transport in interstate commerce obscene, lewd, lascivious and filthy motion picture films, to take from common carriers used to transport in interstate commerce obscene, lewd, lascivious and filthy motion picture films, and to transport in interstate commerce obscene, lewd, lascivious and filthy motion picture films for the purpose of distribution, all said planned acts being violations of Title 18, United States Code, S1462 and S1465. All of the defendants conspired and agreed together, or with at least one other member of said conspiracy, to commit, cause, aid, abet, induce and counsel in all or some of the violations of the United States Criminal Code above cited.

The object of said conspiracy, confederation, plan and agreement was to engage in an ongoing business enterprise designed to profit finacially the individual members of sad conspracy by the production, sale, distribution and public exhibtion of obscene, lewd, lascivious and filthy motion picture films.

1. At sometime shortly prior to June 1971, CARL R. CARTER and DONALD A. DAVIS formulated plans to join together a business enterprise for the purpose of distributing obscene, lewd, lascivious and filthy motion picture films throughout the United States.

23. Between August 30, 1971 through May 17, 1972, ACADEMY FILMS CORPORATION shipped by common carrier to various places throughout the United States the following motion picture films. Part of Count One of Indictment in **United States v. Gerber, Sherpix, et al.**, Cr. No. 73-45 ....

IN THE

UNITED STATES DISTRICT COURT,

For The Western District of Tennessee

Western Division.

UNITED STATES OF AMERICA

v.

PAUL DAVID GERBER, et al

Cr. No. 73-45

18 USC, S1462

18 USC, S2

18 USC, S371

Indictment

The Grand Jury Charges:

COUNT ONE

From on or about some point in time shortly prior to the 1st day of August 1971 up to and including the 1st day of November 1972 in the Western District of Tennessee and divers other places,

Paul David Gerber

a/k/a David Reberg

Richard Lewis Miller

a/k/a R. L. Mills

Louis K. Sher
Arnold Jordan
Tom Berman
Sherpix, Inc.
Art Theater Guild, Inc.
Ellis Gordon
Marvin Friedlander
Marvin Films, Inc.
Gordon Craddock
Gordon Craddock Films, Inc.
Martin Zide
Allied Film Exchange, Inc.
Jerome Sandy
American International Pictures
Exchange of Washington, D. C., Inc.
Abbott Martin Swartz
Independent Film Distributors, Inc.
Emanuel Youngerman
M. Y. Film Co., Inc.
John O. Glaus
John O. Glaus Agency
Lou Wolfe
Harry Brandt Booking Office, Inc.
and
Bernard Levy

hereinafter referred to as defendants, and Saul Shiffrin, Bonded Film Services, Inc. and Movielab, Inc., and others whose names to the Grand Jury are unknown, named herein as co-conspirators but not as defendants, unlawfully combined, conspired, confederated, agreed and planned to engage in conduct against the United States by knowingly using ex-

press companies and other common carriers in interstate and foreign commerce and knowingly taking from such express companies and other common carriers an obscene, lewd, lascivious and filthy motion picture film entitled "School Girl" (herenafter referred to merely as "School Girl"), which said planned acts were then prohibited by Title 18, United States Code, S1462.

The ultimate object of said combination, conspiracy, confederation, agreement and plan was to profit financially the defendants and others by the public exhibition of said motion picture film to paying patrons of theaters throughout the United States. Other objects of said combination, conspiracy, confederation, agreement and plan, designed primarily to attain and enhance the ultimate objective, included obtaining wide notoriety and acclaim for said motion picture film and making all necessary business arrangements to physically place a copy or print of said motion picture film in the possession of theaters for exhibition to the public. Further, the defendants and co-conspirators not named as defendants at various times shipped by use of common carriers prints of "School Girl" to, by, between and among themselves as well as other persons and business entitles, and received from common carriers prints of "School Girl" as shipped.

At the times hereinafter mentioned, the following overt acts were engaged in to further and effect the objectives of said combination, conspiracy, confederation, agreement and plan:

20. From on or about September 1, 1971 up to and including November 1, 1971, Sherpix, Inc., Art

Theater Guild, Inc., Saul Shiffrin and Arnold Jordan collaborated concerning the national distribution of "School Girl" to exhibitors.

29. For a period approximately spanning the duration of the conspiracy, acting under the authority of and by and through its officers and employees including Louis K. Sher, Saul Shiffrin and Arnold Jordan, Art Theater Guild, Inc. shipped prints of "School Girl" throughout the United States to its theaters where it was exhibited to the public.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1063

CARL R. CARTER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that there is no available standard under which they could be tried for conspiring to transport obscene materials in interstate commerce; that the conspiracy statute as applied to the statutes prohibiting such transportation is unconstitutionally vague and overbroad; and that jurors in the district in which they are to be tried are incapable of applying a community standard for the communities to which the obscene materials are transported for distribution.

Petitioners were charged in an eighty-eight count indictment with eighty-seven counts of transportation of obscene motion pictures in interstate commerce by means of a common carrier and transportation of obscene motion pictures in interstate commerce for the purpose of distribution, in violation of 18 U.S.C. 1462 and 1465, and with one count of conspiracy to violate those statutes in violation of 18 U.S.C. 371. Petitioners moved to dismiss the indictment. The district court granted petitioners' motion (Pet. App. B) and the court of appeals reversed *per curiam* (Pet. App. A).

1. The indictment charged petitioners with transportation of more than 30 obscene motion pictures from Memphis to Chicago, Memphis to Portland, Oregon, Memphis to Indianapolis, Chicago to Memphis, and Clarkesville, Tennessee, to Oakgrove, Kentucky. In addition, the conspiracy count charged petitioners with a large scale conspiracy to transport and distribute obscene motion pictures. In moving to dismiss the indictment petitioners argued that since there is no national standard for obscenity (citing *Miller* v. *California*, 413 U.S. 15) and "since only a national standard could be applied under these federal interstate transportation statutes, there is no available standard that could be applied in a trial charging violation of these statutes" (Pet. App. B 32). They urged, alternatively, that, if a local standard should be applied, it would not be the standard in the Western District of Tennessee where they were scheduled to be tried and that the jury therefore would be unable to apply the applicable standard. Even though expressing "considerable doubt as to the validity of these contentions" (Pet. App. B 32), the district court dismissed the indictment since these issues were also raised in ten other cases, in order to allow the court of appeals to resolve the issues prior to any of the trials. The court of appeals, relying on *Hamling* v. *United States*, 418 U.S. 87, and its own decision in *Smith* v. *United States*, 505 F.2d 824 (C.A. 6), rejected petitioners' contentions and reversed (Pet. App. A 29-30).

2. There is no occasion for the Court to review at this stage of the proceedings the issues petitioners raise. As this Court stated in *United States* v. *Fruehauf*, 365 U.S. 146, 157, in refusing to pass upon issues relating to the trial under an indictment whose facial validity was challenged:

> We do not reach that question on this appeal. For we cannot but regard it—abstracted as it has become, in the course of these proceedings, from the im-

> mediate considerations which should determine the disposition of appellees' motions to dismiss an indictment incontestably valid on its face—as other than a request for an advisory opinion. Such opinions, such advance expressions of legal judgment upon issues which remain unfocused because they are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demanding interests, we have consistently refused to give. [Citations omitted.]

Similarly, issues relating to the proper standards governing the trial of petitioners are not appropriate for this Court to consider at this time. Those issues are wholly premature, since the district court has not yet passed upon them and, indeed, properly can do so only in the context of a fully developed record. The indictment is valid on its face, and petitioners' contentions relate only to whether the charges in the indictment properly can be proved. All of the issues that petitioners now seek to have this Court determine can be fully raised and determined on appellate review if petitioners ultimately are convicted. Indeed, the proceedings in the trial court are essential to give the issues petitioners presented the requisite concreteness; what petitioners are now seeking from this Court is essentially an advisory opinion.

It is therefore respectfully submitted that the petition for a writ of certiorari be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1975.